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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MATTHEW STARK and MARCIA NEELY,
Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. 640,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a violation of the Establishment Clause for a public school district to establish and operate an elementary school in a joint venture with a religious sect in a building owned by a sect member with its curriculum modified to conform to the sect's religious objections to the use of modern technological devices and whose student body consists exclusively of sect members.

PARTIES TO THIS PROCEEDING

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There are no parent companies or wholly owned subsidiaries of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Matthew Stark and Marcia Neely respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit (App. A) are reported at 123 F.3d 1068 (8th Cir. 1997). The order and opinion of the United States District Court for the District of Minnesota (App. B) is reported at 938 F. Supp. 544 (D. Minn. 1996). The order denying the petition for rehearing and suggestion for rehearing en banc (App. C) is unpublished.

JURISDICTION

The decision of the Court of Appeals was filed on August 21, 1997. The order of the court of appeals denying the timely filed petition for rehearing and suggestion for rehearing en banc was filed on November 24, 1997. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Minn. Stat. § 126.669 (1993), cited by the court of appeals, is reprinted in Appendix G.

STATEMENT OF THE CASE

This case raises important questions about the constitutionality of a religiously-segregated public school that was opened for the express purpose of operating in accordance with a religious group's curriculum objections.

A. The Undisputed Facts Material To This Court's Consideration Of The Question Presented.

Independent School District 640 (the "School District") is a rural School District in Minnesota. The district includes the towns of Wabasso and Vesta. The School District operated elementary schools in both towns until 1984 when it closed the Vesta school. Thereafter, Vesta children attended the Wabasso school 14 miles away. The Brethren are a Christian religious sect who compromise about one third of the population of Vesta. The Brethren hold a sincere religious objection to the use of technological devices such as computers, televisions, films, and

audio recordings. See *Ware v. Valley Stream High School Dist.*, 550 N.E.2d 420, 424 (N.Y. 1989). Brethren also practice separatist beliefs against socializing with non-Brethren, especially with respect to eating meals with non-Brethren.

The use of modern technology is a prevalent part of the School District curriculum and is used at the Wabasso school as a means to train children to live and work in modern society. Computers are used in every classroom in Wabasso, and a separate computer lab is also regularly used. When Brethren children formerly attended the Wabasso elementary school, the School District accommodated their religious beliefs and excused them from participating in classes and activities that used modern technology.

A member of the Brethren, Lloyd Paskewitz, purchased the former elementary school building in Vesta. In August 1992, he sent a letter (App. D) to the School District, requesting the re-opening of a school in Vesta for Brethren children and offering the School District rent-free use of the former school building in exchange for a ban on modern technological equipment that conflicted with Brethren beliefs. The School District responded favorably to Paskewitz's letter and by February, 1993, the re-opening of the Vesta school was essentially approved. On June 1, 1993, Paskewitz provided the School District with a letter containing the names of all of the 19 Brethren children who would be attending the Vesta school. All of those children and no one else attended the Vesta school in the fall, and the Paskewitz letter was given by the superintendent to the teacher as the class list. No non-Brethren parent was given a choice of attending the Vesta School.[1]

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[1] A letter that the School District claims solicited non-Brethren to consider attending the Vesta school does not, in fact, refer to the Vesta school, but instead refers to creation of a multi-age classroom in Wabasso. Bates Affidavit, Ex. H.

The Vesta school was reopened in the fall of 1993 pursuant to a formal contract establishing a joint venture between the School District, Paskewitz and the "Brethren." In that contract (App. E), the School District agreed to provide a teacher and books and limit the use of technology in the curriculum, in exchange for free rent and the Brethren's agreement not to home-school their children and thereby cause the consequent loss of state per-pupil aid; the Brethren and Paskewitz also agreed to provide building maintenance, security, insurance, and real estate taxes. In addition, the parties agreed that special education, health, gym and music classes would not be provided, and students wanting these classes would be educated in Wabasso. The School District admits, as Superintendent Bates testified, that the deletion of technology and media at the Vesta School was due solely to the request of the Brethren, and was not based on any determination or evidence that there is any educational benefit to deleting technology and media.

It is undisputed in the record that throughout the Vesta school's operation, Brethren children have made up 100% of the enrollment. All non-Brethren children in Vesta and elsewhere in the School District have continued to attend school in Wabasso. Plaintiff Neely testified that one of the Vesta school teachers told her that she had as many students as she could handle and that non-Brethren have been discouraged from attending.

B. Proceedings Below.

After the close of discovery, the parties filed cross motions for summary judgment. The district court ruled that "the facts presented by this case provide a clear example of state sponsorship, or the advancement, of a religion which violates the mandates of the First Amendment." *Stark v. Independent School District No. 640,* 938 F. Supp. 544, 550 (D. Minn. 1996). The court therefore granted summary judgment to plaintiffs and enjoined the

School District's operation of an elementary school in Vesta, Minnesota in accordance with the Brethren's religious objections to the use of computers, films, televisions, audio recordings and other technology. *Id.* at 554-55.

The district court based its decision on the well-established constitutional prohibition against the tailoring of curricula to satisfy the principles or proscriptions of any religion. *Epperson v. Arkansas,* 393 U.S. 97 (1968) (striking down Arkansas statute prohibiting the teaching of evolution); *Edwards v. Aguillard,* 482 U.S. 578, 593 (1987) (striking down creationism act because its "purpose . . . was to restructure the science curriculum to conform with a particular religious viewpoint"). The district court found that religious ideology determined the curriculum. The district court also based its decision on the documented and reasonable perception in the community that the Vesta school is a Brethren school. 938 F. Supp. at 552. The court found it significant that though the school is theoretically open to all children, only Brethren children have attended. The court further found that the enrollment was determined by religious affiliation because the segregated Vesta school population was not the result of geography or a random feature. All non-Brethren Vesta children have continued to travel 14 miles each way to school in Wabasso.

A divided panel of the court of appeals reversed the district court's entry of summary judgment for plaintiffs, and remanded for entry of summary judgment in favor of the School District. The panel majority found the opening and operation of the Vesta school constitutional under *Lemon v. Kurzman,* 403 U.S. 602, 612-13 (1971); and *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687 (1994).

The panel majority did not attempt to locate a secular purpose for the deletion of technology, but instead found that the opening of the Vesta school was justified by the

secular reasons of space efficiency, savings in transportation costs [2] and avoiding the loss of state aid if the Brethren opted for home schooling. None of the reasons relied upon by the panel majority were found in any contemporaneous record of the school district's decision; instead, they are found only in the affidavits of the school district submitted in this litigation.

The panel majority found that the opening and operation of the Vesta school did not advance or endorse the Brethren's religious beliefs analogizing this case to those involving the neutral provision of government services. The majority cited such cases as *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995), and *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1 (1993). The majority did not address the community perception of the Vesta school as a Brethren school or attempt to identify a secular reason for the segregation of the Vesta school along religious lines, other than to state that the Vesta school is open to all and there is no evidence that non-Brethren students wishing to attend have been turned away. The panel majority found "little significance in the fact that [the Brethren] are a party to the lease" agreement with the School District. App. at 4a n.7.

The panel majority also found that the School District had not advanced or endorsed the Brethren's religious beliefs or singled the Brethren out for a special benefit in violation of *Kiryas Joel,* opining that the School District grants all parental requests for curriculum exemptions pursuant to Minn. Stat. § 126.699 and/or claimed district policy. The panel majority did not address Judge Murphy's observation in dissent that the School District's claimed reliance on Minn. Stat. § 126.699 could not be true "because the district approved the proposal from the

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[2] This purpose is furthered only if those who attend the Vesta school do not wish transportation to Wabasso for computer and technology instruction. Accordingly, the benefit is tied to the Brethren.

Brethren to reopen the school in February 1993 and . . . § 126.699 was not passed until May 1993." App. at 23a, n.9.

For this and other reasons, Judge Murphy concluded that the establishment and operation of the Vesta school was unconstitutional under *Epperson, Edwards, Lemon,* and *Kiryas Joel.* She found that the Vesta school lacked a secular purpose because the School District contracted with a religious group to limit the use of technology, not for pedagogical reasons, but to match the tenets of a religious group and secure state aid controlled by the Brethren's attendance at a public school. She also found that the opening and operation of the Vesta school resulted in an endorsement of the Brethren's beliefs because, based on clear evidence that both Brethren and non-Brethren consider the Vesta school to be a Brethren school. This local perception also explained the complete segregation of the Vesta school along religious lines. Finally, Judge Murphy found that, like the legislature in *Kiryas Joel,* the School District impermissibly singled out the Brethren for a special benefit because there is no guarantee that the next religious group could obtain a special school for its members with a publicly-funded school teacher teaching a modified curriculum in accordance with the sect's religious beliefs.

On November 24, 1997, a divided court of appeals denied plaintiffs' petition for rehearing and suggestion for rehearing en banc. In addition to Judge Murphy, Chief Judge Arnold and Judge McMillian voted to rehear the case en banc.

REASONS FOR GRANTING THE WRIT

Review is warranted for three reasons.

First, the Eighth Circuit's decision that the School District may constitutionally operate an elementary school with a curriculum modified to conform to Brethren re-

ligious objections to modern technology is contrary to the otherwise unanimous view of lower federal courts that this Court's decisions in *Epperson* and *Edwards* prohibit the tailoring of public schol curricula for religious believers to satisfy their religious objections to curricula components. *Epperson* and *Edwards* addressed the tailoring of school curricula for all students in a state, whereas this case and several others address parental requests for tailoring the curricula of a particular school or course to conform to their religious beliefs. The recurring nature of such requests and the conflict now created as to whether a public school's granting of such requests is an Establishment Clause violation warrant this Court's review.

Second, the Eighth Circuit's decision sanctioning the opening and operation of an elementary school as a joint enterprise with the Brethren, attended only by Brethren children in a building owned by a Brethren member, with a curriculum conformed to Brethren objections to modern technology, is fundamentally at odds with this Court's decision in *Kiryas Joel* prohibiting the use of religious criteria to accomplish segregation. The court of appeals decision is also contrary to *Kiryas Joel's* prohibition on singling out of a particular religious group for a special benefit. A fundamental constitutional problem with the School District's ad hoc establishment of the Vesta school is the lack of neutrality, i.e. a guarantee that other religious and nonreligious groups will be treated similarly when they seek the operation of a school in accordance with their objections to secular curriculum items.

Third, even if groups of other religious believers could count on receiving treatment equal with the Brethren, the Eighth Circuit's decision approves the balkanization of public schools along religious lines and the undermining of cohesion that is a historical hallmark and goal of the American public school. These consequences should not be endured by children who live in the Eighth Circuit or

elsewhere in school districts that will rely on the Eighth Circuit's opinion for guidance in the absence of constitutional certainty that only this Court can provide.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS ADDRESSING THE CONSTITUTIONALITY OF PUBLIC SCHOOL CURRICULA OR PROGRAMS THAT ARE MODIFIED OR ESTABLISHED FOR THE EXPRESS PURPOSE OF CONFORMING TO RELIGIOUS OBJECTIONS OR BELIEFS.

This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). This Court has established a rule, heretofore unquestioned, that the First Amendment does not permit a school district to tailor its curriculum "to the principles or prohibitions of any religious sect or dogma." *Epperson*, 393 U.S. at 271; *Edwards*, 482 U.S. at 590-91. The trial court below relied upon these precedents when it found that the technology-free Vesta school was created for the express purpose of "conform[ing] to the religious beliefs of the Brethren," and accordingly held the school unconstitutional. App. at 44a. By ignoring the principle established by this Court, the court of appeals decision is in direct conflict with *Epperson* and *Edwards*.

The court of appeals decision also conflicts with the holdings of other lower federal courts. Relying on *Epperson*, *Edwards* and *Lemon*, the lower federal courts had heretofore been vigilant in policing attempts to modify school curricula and practices for religious believers to conform to their religious objections and beliefs. For example, in *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), the court found unconstitutional New York City's plan to tailor remedial education to Hasidic beliefs in order to induce parents of female

Hasidic Jews to send their children to a public school. 803 F.2d at 1237. The City had agreed to establish separate classrooms in a public school for the Hasidic girls in which only they would be taught, to partition the school so the Hasidic girls would have their own entrance and would not come across other students, to teach the classes in Yiddish, to ensure that the Hasidic girls did not have contact with boys, and to teach the girls only with female teachers. *Id.* at 1237. The court stated that "[t]he lengths to which the City has gone to cater to these religious views . . . are plainly likely to be perceived by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith." *Id.* at 1241.[3]

Similarly, in *Bollenbach v. Board of Education*, 659 F.Supp. 1450, 1464-65 (S.D. N.Y. 1987), the court held unconstitutional a school district's agreement with a religiously-based request to use only male bus drivers to transport Hasidic Jewish male students. *Id.* at 1464-65 ("The District's use of male drivers would effectively transform this neutral [bus] service into a vehicle for promoting the Hisadic tenet that boys must not be in contact with women."). The *Bollenbach* decision, built on the Second Circuit holding in *Quinones*, is in direct conflict with the panel decision below. Unable to distinguish

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[3] The Second Circuit's endorsement approach to the second prong of the *Lemon* test is consistent with *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595 (1989) (effect of the créche display depends on what viewers may fairly understand to be its purpose); and *Witters v. Washington Dept. of Services, etc.*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring) (effect must be judged according to standard of a "reasonable observer"). In her dissent, Judge Murphy also relied on *Allegheny* in finding an impermissible governmental endorsement of the Brethren's religious beliefs. The panel majority attempted to distinguish *Quinones*, not by addressing the community perception of the Vesta school as a Brethren school and whether that reasonable perception indicated endorsement of Brethren's beliefs, but by comparing the segregation at the Vesta school, which it found to be de facto, with the de jure segregation in *Quinones*.

Bollenbach, the panel majority did not address that case or account for its favorable citation in *Pulido v. Cavazos*, 934 F.2d 912, 921 (8th Cir. 1991), where it was cited with approval and described as finding that the deployment of "only male bus drivers on bus routes would have the primary effect of advancing Hasidic religion."

The panel decision is also at odds with the interpretations of *Epperson* and *Edwards* by all other circuits which have addressed the issue. The Sixth Circuit found in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1064 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988), that creation of alternative programs for the children of religious believers to conform to their objections to the normal curriculum would be an unconstitutional establishment of religion. (citing *Epperson*). Likewise, the Fourth Circuit has affirmed a district court's conclusion that "Maryland is not required to 'subsidize' . . . particular religious beliefs by eliminating contrary viewpoints from the required currciulum," and that "Maryland is prohibited from doing so by the Establishment Clause of the First Amendment." *Battles v. Anne Arundel County Bd. of Educ.*, 904 F.Supp. 471, 477 (D. Md. 1995) (citing *Edwards*), *aff'd* 95 F.3d 41 (4th Cir. 1996). A district court in Utah denied a student's request for court-ordered removal of choral songs that violate her religious beliefs, stating that "the Supreme Court has held that for a school to tailor its curriculum to satisfy the principles or prohibitions of any religion would violate the Establishment Clause." *Bauchman v. West High*, 900 F.Supp. 254, 276 n.22 (D. Utah 1995) (citing *Epperson*), *aff'd* 132 F.3d 542 (10th Cir. 1997).

Most recently, the Tenth Circuit has stated "there is a real possibility" that a requested religious exemption to a school district's full-time attendance policy for the purpose of home-schooling on subjects where the school's presentation is religiously objectionable would be unconstitutional under *Kiryas Joel*. *Swanson v. Guthrie Inde-*

pendent School District No. 1-L, —— F.3d ——, 1998 Westlaw # 31743, *7 n.7 (10th Cir. 1998). *Swanson* is also notable for plaintiffs' recognition of the rule against curriculum modifications to conform to religious objections. Indeed, plaintiffs there "maintain that they do not wish to alter the curriculum offered by the Defendants," they only want to home-school their children on subject where the curriculum offends their religious beliefs. *Id.* at *6.

The panel majority's decision in this case conflicts with the decisions of this Court and the approach embraced by all other lower federal courts. Supreme Court review is necessary to resolve that conflict.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THE NEUTRALITY PRINCIPLE FOUND IN THIS COURT'S DECISION IN *KIRYAS JOEL*.

As this Court emphasized in *Kiryas Joel*, a "fundamental source of constitutional concern" is that a government body "may fail to exercise [its] authority in a religiously neutral way." *Kiryas Joel*, 512 U.S. at 703. *Accord Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). The singling out of one religious group or community for special treatment violates this command, as does the awarding of special benefits based on religious criteria. *Agostini v. Felton*, —— U.S. ——, 117 S.Ct. 1997, 2016 (1997). *Accord Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in judgment). In *Kiryas Joel*, 512 U.S. at 702-05 (majority opinion Part II-B), the Court held that the legislatures creation of a school district based on the religious affiliation of community residents was unconstitutional because it used religious criteria to establish boundaries and it impermissibly singled out a particular group for special treatment.

As Judge Murphy correctly found in dissent, the School District's agreement with the Brethren to operate a school

that conforms to Brethren religious objections to modern technology reflects the same defect, born of the ad-hoc exercise of power based on religious criteria. As in *Kiryas Joel*, the benefits here "flow only to a single sect." *Id.* at 705.[4] Moreover, there is no assurance that when other religious groups make similar requests that the School District will agree to open and operate a public school for them. The assumption that the School District will grant all future requests, relied on by the majority, is belied by the School District's ad hoc decisionmaking process. Regardless, this Court has held that it cannot rely on such unsupported assurances. *Id.* at 696.

The decisions of this Court in *Zobrest, supra, Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481 (1986), *Mueller v. Allen*, 463 U.S. 388 (1983), and others have upheld government provision of educational services and aid, even to religious institutions, because the programs were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Witters, supra*, at 487 (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)). Similarly in *Zobrest*, neutral benefits provided to a broad class of students without regard to the religious nature of the school did not offend the Establishment Clause. *Id.*, at 10. What distinguishes this case from those relied upon by the panel majority is that the benefit of the Vesta school is directed at the children of one religion, and the public school's curriculum is conformed to one religious ideology.

In *Kiryas Joel*, Justice Souter found strong evidence of the school district's unconstitutionality in the fact that religion, and not geographic or historic criteria, was the explanation for the school district's organization and seg-

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[4] This is especially true because non-Brethren parents were not solicited for their interest in sending their children to school in Vesta or given any choice as to which curriculum items and teaching methods would be used at the Vesta school.

regated student population. *Id.*, 512 U.S. at 701-02, nn. 5-6. He noted that a different case is presented when "boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists." *Id.* at n.6. Similarly, Justice Kennedy found that regardless whether the intent is to accommodate and regardless whether government provides "similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government from using religion as a line drawing criterion." *Id.*, at 729. Therefore, according to Kennedy, it may not segregate on the basis of religion. *Id.*

In this case, the panel majority ignored the trial court's finding that the religious segregation in the Vesta school was "not the result of a random feature or of a geographical function," App. at 46a, and it closed its eyes to the written agreement favoring the Brethren. App. at 4a, n.7. It offered no non-religious explanation for the fact that the Vesta school has always been attended solely by Brethren, and that all non-Brethren children who live in Vesta or closer to Vesta than Wabasso continue to be bussed to Wabasso for school. That complete segregation is compelling evidence of the Vesta school's lack of secular purpose and effect.

Review is necessary to bring this case in accord with the neutrality principle which is the touchstone of Establishment Clause jurisprudence, as this Court found in *Kiryas Joel.*

III. THE EIGHTH CIRCUIT'S DECISION THREATENS THE HISTORIC ROLE OF THE AMERICAN PUBLIC SCHOOL AS A DEMOCRATIZING INSTITUTION.

"The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to

avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). "[T]he avoidance of religious divisiveness is nowhere more important than in public education,' and segregation along religious lines "is inconsistent with the public schools' compelling interest in 'promoting cohesion among a heterogeneous democratic people.'" *Mozert v. Hawkins*, 827 F.2d 1058 (6th Cir. 1987) (Kennedy, J., concurring), quoting *Illinois ex rel. McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring).

The panel majority's decision is the first decision in the country to sanction the operation of a religiously-segregated public school that cannot be explained by coincidence, geography or some other secular purpose. If allowed to stand, there is a serious risk that the decision will foster the balkanization of public schools along religious lines, with curricula conformed to delete material that is religiously objectionable. That reality, which now exists in at least one rural Minnesota school district, approved by the decision of the Eighth Circuit, is inconsistent with this Court's and this country's historic vision of the public school. The constitutionality of this important new reality should be reviewed by this Court.

CONCLUSION

This Court should grant certiorari in this case to delineate the constitutional limits on a school district's exercise of authority to modify its curriculum to conform to religious precepts, to address the provision of special educational benefits to a group of religious believers, and to correct the serious misstep taken by the Eighth Circuit to foster religious separatism in the public schools. The decision below is inconsistent with prior decisions of this Court and with the decisions of other circuits and district courts, and the issues are of sufficient public importance and recurring nature as to warrant the granting of certiorari.

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